

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.361 of 1992

Arising out of PS.Case No.-576 Year-1983 Thana -SSM(M) District- SASARAM (ROHTAS)

- =====
1. Sheo Gorh, Son of Aganu Gorh.
 2. Nirekha Gorh.
 3. Bilash Gorh, Both sons of Sheo Gorh.

All residents of Village-Basantpur Tola Sahibganj, PS-Sasaram, District-Rohtas.

.... Appellants

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (DB) No. 424 of 1992

Arising out of PS.Case No.-576 Year-1983 Thana -SSM(M) District- SASARAM (ROHTAS)

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Kailash Gorh, Son of Sheo Gorh.

Resident of Village Basantpur, Tola Sahibganj, P.S. Sasaram, District Rohtas.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants	:	Shri Ashok Kumar Mishra, Advocate
(in both the appeals)		Shri Varun Kumar, Advocate
		Smt. Pratibha Srivastava, Advocate
		Shri Ashok Kumar Giri, Advocate
For the State	:	Shri Dilip Kumar Sinha, APP
		Shri Abhimanyu Sharma, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 11-12-2014

The two appeals are directed against the judgment of conviction dated 31.08.1992 and the order of sentence dated the 01.09.1992 passed by the learned 3rd Additional Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 40 of 1985/18 of 1988 by

which the appellants were convicted of committing offence under Sections 302/34 of the Indian Penal Code and each of them was directed to suffer imprisonment for life.

2. The occurrence was dated the 29th of December, 1983 having taken place at about 5 P.M. when the deceased, as per the *fardbeyan* of P.W.9 Chourasia Devi, was going to attend to call of nature and had reached near the house of Sri Kishun Choudhary in his village that the four appellants are said to have arrived there and to have suddenly attacked the deceased. It is stated that deceased Ram Nath Choudhary raised alarm which attracted the informant P.W.9 Chourasia Devi who also raised alarm. She saw that appellant Sheo Gorh fired a shot at her husband but it misfired. Appellant Kailash Gorh, just thereafter, pierced a *Chhura* into the ribcage of the deceased as a result of which he fell down and another *Chhura* blow was given by appellant Nirekha Gorh. Appellant Bilash Gorh is said to have given a *lathi* blow to the deceased while he was lying on the ground. The deceased and the informant kept raising alarms which attracted Bishwanath Choudhary (P.W.9), Ramji Choudhary (P.W.1), Ramnivas Choudhary (P.W.7), Ramashray Choudhary (P.W.2) and Shatrughan Choudhary (P.W.5) who saw the occurrence. Seeing the villagers converging upon the place of occurrence, the accused

persons ran away from there. The deceased died within 10-15 minutes of the occurrence. The informant stated that after the death of her husband, she wept and wailed and many persons assembled there and in the meantime, the Assistant Sub-Inspector of Police came who recorded the *fardbeyan*.

3. The informant stated that a day prior to the occurrence or prior to the date of occurrence, i.e., on 28.12.1983 on Wednesday, one Ugani who happened to be the daughter of appellant Sheo Gorh along with his grandson Surendra went to graze goats. The son of the informant and the deceased, namely, Dhruv @ Raja (P.W.6) had also gone to graze the goats and had found that the goats of Shoe Gorh were grazing in the field of the deceased which had gram plants grown in it. P.W.6 Dhruv @ Raja protested to the grazing of the gram plants and there was a fight between P.W.6 on the one hand and the daughter of appellant Sheo Gorh, namely, Ugani and his grandson Surendra on the other. It was stated that appellant Sheo Gorh came there and beat up P.W.6. On the very next day of the above incident when P.W.6 Dhruv @ Raja was again going to graze his goats, he was severely beaten up by both appellants Sheo Gorh and his son Kailash Gorh so much so that the boy (P.W.6) had to be taken to Sasaram to a doctor for treatment. It was stated that for the above reasons the deceased had

been murdered.

4. The Investigating Officer did not turn up during the trial for his evidence. As such, we do not know as to how the investigation had been carried out and what were the objective findings of the Investigating Officer as regards the place of occurrence and other findings in that respect. However, what appears is that the police had held inquest upon the dead body and had dispatched the dead body for post-mortem examination.

5. Dr. Sudhir Kumar Sinha (P.W.4) had held post-mortem examination on the dead body of deceased Ram Nath Choudhary on the 30th of December, 1983 and had found the following ante-mortem injury on his dead body:

(i) Sharp cut injury 1" x ¼" x abdominal cavity deep over the right side of abdomen in between the 9th and 10th inter costal space.

On dissection, P.W.4 found thoracic and abdominal cavity full of blood and blood clots due to damage to the right kidney and as appears from Ext.1, the post-mortem report, there was a punctured wound over the middle of right kidney and that was the cause of death. In the opinion of P.W.4, the solitary injury and the internal damage to the kidney was caused by a sharp pointed weapon, like, a dagger and the death had occurred on that account.

In the opinion of P.W.4, the injury was caused by a single blow. Thus, what appears is that the death of deceased Ram Nath Choudhary was caused by a single blow and further that P.W.4 did not find any injury caused either by a blow given to him by a *Chhura* or a *lathi*.

6. What appears further is that after close of the investigation, the appellants were sent up for trial and ultimately they were convicted.


7. Nine witnesses were examined by the prosecution to bring the charge home against the appellants out of whom P.W.3 Ram Chandra Pandey was a witness of formal character who has brought the volume containing the carbon copies of post-mortem reports which contained the copy of the post-mortem report of the present case also. As appears from the evidence of P.W.4, he had prepared Ext.1 by carbon process and one of the official copies of the post-mortem report has been exhibited by him as Ext.1. The other witness P.W.8, though named in the First Information Report as an eye witness, had not supported the prosecution story and, as such, he was declared hostile. As regards the remaining witnesses, Ramji Choudhary (P.W.1), Ramashray Choudhary (P.W.2), Shatrughan Choudhary (P.W.5), Dhruv @ Raja (P.W.6), Ramnivas Choudhary (P.W.7) and Chourasia Devi (P.W.9) the informant and

wife of the deceased had all given eye witness account of the occurrence. Dhruv @ Raja (P.W.6), who happened to be the son of the deceased and Chourasia Devi (P.W.9), appears aged about 10 years at the time of occurrence. At the time of his deposition in court, he was 17 years of age and he was deposing in court after 7 years of the incident.

8. The defence did not examine any witness.


9. It was contended by Shri Ashok Kumar Mishra, the learned counsel for the appellants appearing in the two appeals that the informant Chourasia Devi (P.W.9) may not be an eye witness as appears the case also with P.Ws. 7 and 8 who may not be eye witnesses too. So far as the other witnesses are concerned, It is admitted that they were the members of the same family and they had go together to drive away the Gorh people, who were the appellants, from the village and they had come together with a solitary motive of getting them pushed out of the village and thus, seeing them exit from their village. Submission also was that the *fardbeyan* or the First Information Report was not brought on record by properly proving the contents of the two documents and, as such, it is a serious defect in the prosecution story.

10. Chourasia Devi (P.W.9) has given an eye witness account initially in her examination-in-chief evidence and



has very categorically stated that when her husband was attacked by the accused persons while he was going to attend to the call of nature, she heard the alarms of her husband and rushed towards the place of occurrence and saw appellant Kailash Gorh giving the first *Chhura* blow into the ribcage of the deceased whereafter he fell down when the next blow was given by appellant Nirekha Gorh. Appellant Bilash Gorh dealt a single *lathi* blow and when the informant went to intervene, she was also given a *lathi* blow by appellant Bilash Gorh. She stated that her husband had been attacked only because her son Dhruv @ Raja (P.W.6) had been assaulted one day prior to the occurrence so much so that her husband had to take him to a doctor and he had again been assaulted on the following day and the accused persons were probably for the reason that the boy had protested to the grazing of the gram plants, had assaulted and killed her husband.

By referring to paragraphs 12 and 13 of the evidence of P.W.9, Shri Mishra was submitting that she could not be an eye witness to the occurrence. P.W.9 in paragraphs 12 and 13 stated that when she reached near her husband, she found that it was bleeding from his body and the blood was oozing out of the right ribcage. In paragraph-13, she again stated that when she reached near her husband, she found that the blood was coming out of the



Chhura injury caused to him. At the strength of these two lines appearing in paragraphs 12 and 13, Shri Mishra was submitting that this witness could not be an eye witness. On a first blush the witness appears not an eye witness because when she reached there she had found her husband bleeding but when we had considered the evidence of all the witnesses, we found that there was a mountain situated east of the place where the houses of the accused and the injured were located. There was a path way which was running from the hamlet to the mountain and there were neither trees nor any other obstruction which could block or obstruct the vision. Dhruv @ Raja (P.W.6), who happened to be the son of the deceased and who was as young as to be of 17 years when he was deposing in court, was pointing out that the place where his father had been assaulted was almost in front of his house and the vision was unobstructed. It might be true that when P.W.9 had reached near the place of occurrence, the occurrence had been over. She has been very categorical in making direct allegations of giving assault on specific accused persons. We have already pointed out that the vision was unobstructed and that the incident had occurred on the path way and witnesses had been attracted on the shouts of the deceased or the informant, as the case may be, and had seen the accused persons assaulting the deceased. Thus, there does not


appear any reason to reject the evidence of P.W.9 as not an eye witness.

11. As regards the evidence of P.W.1 Ramji Choudhary, we find that he had not really seen the main part of the occurrence, i.e., giving of blows with *Chhura* to the deceased by any accused persons. On a combined reading of paragraphs 23 and 28 of P.W.1, what appears is that he had reached at the time when all the accused persons were leaving the place of occurrence but he still remained a good witness on one aspect of the occurrence that Ram Nath Choudhary the deceased was bearing injuries and he was bleeding and that the accused persons were seen leaving the place of occurrence. Thus, his evidence also supports the prosecution story that Ram Nath Choudhary was given a *Chhura* blow and he was found bleeding from his body.

12. Dhruv @ Raja (P.W.6) was the boy who had been beaten up by the accused persons merely because he protested the grazing of the gram plants by the goats of appellant Sheo Gorh. He was beaten up so badly that he was taken to a doctor and he stated that while he was sitting with his mother at the outer part of his house, the occurrence had taken place and hearing the shouts of his father, he and his mother found his father being attacked firstly by Kailash Gorh and subsequently by Nirekha Gorh by *Chhura*.


The evidence of P.W.6, we must record, is as clear and categorical as to render him a trustworthy witness. We further find Ramashray Choudhary (P.W.2) supporting the prosecution story that deceased Ram Nath Choudhary was assaulted with *Chhura* and he was killed.

13. Shri Mishra was drawing our attention towards the evidence of P.W.7 who stated in paragraph 19 that he and Bishwanath Choudhary (P.W.8) had informed the police and had described the occurrence fully. Likewise, the attention of the court was also drawn to paragraph 15 of Dhruv @ Raja (P.W.6), the son of the deceased who had stated that the police had arrived at the scene of occurrence and it was P.W.6 who had given the first statement which was followed by the statement of his mother. Shri Mishra was submitting that those statements of P.Ws. 1, 7 or 8 were suppressed by the prosecution and that is a serious defect in the prosecution case. While considering the evidence of those witnesses, we found that they had really stated that they informed firstly or made statement firstly to the police. But we do not find any evidence by way of suggestion to those witnesses that the story which had been narrated by them was something different than what was stated by P.W.9. Not only that those witnesses were not suggested even faintly that their statements were recorded by the police and those were reduced into writing. If we have a glance of



Section 154 Cr.P.C., we may find that a statement, if given orally, has to be reduced into writing and at the same time it has to be signed by the person who makes that statement. A First Information Report could be a document under Section 154 Cr.P.C. only when it has been reduced into writing if an oral statement has been given and the written document thus created, is signed by the maker of the statement. We do not have any document like that and, as such, we cannot attach much credence to this argument of Shri Mishra that the prosecution is guilty of suppressing the true facts of the case. In fact, there was no suggestion as we have already noted that those statements which if at all were given by P.Ws.6 or 7 or 8 had been in respect of facts which were completely different from the ones which is presently being assessed in the present set of appeals.


14. The other submission which was made by Shri Mishra was that the First Information Report of the case and the *fardbeyan* was not brought on record and, as such, it was a defect in the prosecution case. We requested Shri Mishra to consider Section 35 of the Evidence Act which lays down that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in



performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact. Recording the *fardbeyan* or drawing the First Information Report is as per provision of Section 154 Cr.P.C. and the reduction of an oral statement into writing is a mandate on the basis of which the form of First Information Report prescribed by Rules of the Bihar Manual are to be filled up for instituting a case. The records of First Information Report is not an ordinary document, it is rather a record also of the discharge of the public functions of a public servant as per law of the land ordaining such discharge of official and public duties. As such it is a relevant document under Section 35 of the Evidence Act. Shri Mishra ultimately agreed that the document was inadmissible document. Moreover, we all very well know that the First Information Report is not an evidence in any criminal case. It has the dual purpose of either corroborating the maker of the document or of contradicting him. However, most important thing about it is as to what was the initial prosecution version and even if the document had not been brought on record, the court could very well consider the contents of the document to find out what was the initial prosecution story and whether that prosecution story had been corroborated by the prosecution witnesses or not. After considering the evidence of

witnesses, we do not find that the witnesses had deviated any bit from the initial prosecution story rather we find that they were all consistently stating the same story.

15. However, while considering the medical evidence in the light of the oral evidence, we find that there was a serious anomaly in the prosecution story. The doctor stated that the solitary injury which was found by him on the dead body was caused by a single blow given by a weapon, like, *Chhura* and that had caused the damage to the kidney which had ultimately caused the death of Ram Nath Choudhary. He did not find any further injuries either of *Chhura* or of *lathi*. Thus, what appears is that the allegation against appellant Nirekha Gorh that he had given the second *Chhura* blow or that against Bilash Gorh that he had given a *lathi* blow to the deceased after he had fallen down after receiving the first blow by *Chhura* given by appellant Kailash Gorh is not corroborated by the medical evidence. Likewise, appellant Bilash Gorh had given a *lathi* blow to the informant is also doubtful as P.W.9 had never been examined by a doctor. Thus, it creates a doubt as regards the prosecution story that Nirekha Gorh or Bilash Gorh had given *Chhura* or *lathi* blows to the deceased and the informant. In view of this contradiction between the oral and medical testimony, we give benefit of doubt to appellants Nirekha



Gorh and Bilash Gorh. As regards appellant Sheo Gorh, he was allegedly armed with a pistol but the very case of the prosecution is that it had misfired when he pulled the trigger and we do not have any material evidence to suggest that the four persons were acting in furtherance of their common intention because there is no remonstrance, there is no shouting, there is no individual blow given by any of the accused persons as we have just demonstrated. In that view of the matter, the prosecution, in our opinion, has succeeded in establishing the complicity of the solitary appellant Kailash Gorh. Then again the question as to the solitary blow which was given without any remonstrance or without any heated exchange of words or without any further action in furtherance of common intention could it be said that it was a blow which was so decisive as to bringing the case within the purview of Section 302 of the Indian Penal Code. The blow was solitary. There was no repetition. It was never preceded by any remonstrance or abatement. There does not appear any animosity between the parties except a very small incident which was due to quarrel among the children. In our opinion, the intention and knowledge which is the prerequisite to an act covered by the provision of Section 302 of the Indian Penal Code appears lacking and in that view what we find is that Kailash Gorh could be convicted under Section 304 Part

II of the Indian Penal Code. He must be knowing that in all probability, death could be the result and in that view of the matter we alter his conviction from Section 302 of the Indian Penal Code to Section 304 Part II and direct him to suffer rigorous imprisonment for five years. As regards the other appellants, namely, Sheo Gorh, Bilash Gorh and Nirekha Gorh, they are acquitted of the charges they had been found guilty of by setting aside the judgment of conviction and sentence in their individual respects. Let appellant Kailash Gorh surrender in the court below and serve out the sentence. It goes without saying that the period which he had already served during the trial or during investigation shall be set off against the above term of imprisonment awarded by us to him.

16. Cr. Appeal (DB) No. 361 of 1992 is allowed and Cr. Appeal (DB) No. 424 of 1992 is dismissed in terms as indicated above.

(Dharnidhar Jha, J.)

(Amaresh Kumar Lal, J.)

Sanjay/N.A.F.R.

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